Supreme Court, U.S.
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No. 00-948

In The

Supreme Court of the United States

UNITED AIRLINES, INC.,

Petitioner,

v.

LESLIE FRANK, PAT PARNELL, SUSAN BRODERICK, CAROLE KIRK, NICHKOL MELANSON, SANDRA HUFF, DIANE DAVIS, SHARON BENJAMIN, SHARRON TAYLOR, BLAND LANE, JOAN BALLA WEAVER, DONNA DURKIN and ELLEN McCORMICK, on behalf of themselves and all others similarly situated,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Appellants/Respondents respectfully submit this Brief in Opposition to the Petition for Writ of Certiorari ("Petition") filed by Appellee/Petitioner United Airlines, Inc. (United), in which they are seeking review of portions of the Ninth Circuit Court of Appeals' decision in *Frank v. United Airlines, Inc.*, 216 F.3d 845 (9th Cir. 2000), (the "Opinion").

STATEMENT OF THE CASE

The factual and procedural background as set forth in the Opinion is hereby incorporated by reference. Pet.App.1a-6a.

The primary issue for which Petitioner requests a Writ of Certiorari is the preclusive effect of a 1979 judgment in *ALPA v. United Airlines, Inc.*, 26 Fair Empl.Prac.Cas. (BNA) 607 (E.D.N.Y. 1979) ("*ALPA*"). Pet.App.86a-126a.[1]

ALPA was a class action brought on behalf of all present and future female flight attendants at United Airlines, alleging that United's mandatory weight requirements discriminated on the basis of gender.

The present action was filed 12 years after the October 30, 1979 decision in *ALPA* and addresses a new

[1] ALPA (The Air Line Pilots Association) was the union for United's flight attendants. By the end of the litigation ALPA was replaced by the Association of Flight Attendants ("AFA").

weight program which was implemented on February 1, 1980.

Petitioner asserts that the present action is barred under the doctrine of claim preclusion/*res judicata*.

In support of that assertion, Petitioner's description of the *ALPA* litigation and judgment presents a somewhat inaccurate picture. Petitioner goes so far as to misstate that the present action attacks the same weight program adjudicated in *ALPA* and it mischaracterizes the present action as "re-litigation in the California District Court." Pet.5.

A. The *ALPA* Litigation Ended in 1979

Petitioner states that from the early 1970s until July 1994 United maintained a weight program for its flight attendants. In fact, the weight program was changed and a "new weight program" was implemented on February 1, 1980. Judith Hart, United's labor relations representative, states that "As a result of the [*ALPA*] decision, AFA and United negotiated a new weight program. . . . " Appellee/Petitioner's Supplemental Excerpt of Record 31-32 (Declaration of Judith Hart).[2]

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[2] Appellants/Respondents submitted an Excerpt of the Record to the Ninth Circuit (hereinafter, "ER"). Appellee/Petitioner submitted a Supplemental Excerpt of the Record (hereinafter, "P/Supp.ER"). Appellants/Respondents also submitted a Supplemental Excerpt of the Record (hereinafter, "R/Supp.ER").

The district court rejected the claim that the different weight requirements for men and women were discriminatory, but found that United was applying the weight requirements in a discriminatory manner. *ALPA*, Pet.App.125a-126a.[3]

On January 29, 1980, counsel for the Plaintiff class, jointly with counsel for United, wrote to the court informing it that the parties had entered into a settlement by which they would dismiss their appeals and United would revise its weight program. Pet.App.9a, n.5, ER 25,27,41.[4]

Petitioner mischaracterizes the settlement and the new weight program as "compliance with the [*ALPA*] judgment." Pet.4.

Despite the fact that the 1979 *ALPA* judgment held that United discriminated against female flight attendants in its application of the weight program, there is nothing in the judgment which even suggests, much less requires,

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[3] Petitioner points out that the *ALPA* decision compared United's weight requirements to statistics from "the relevant labor market" in a Health Examination Survey conducted by the United States Public Health Service ("HES study") Pet.4. Petitioner fails to acknowledge, however, that the district court defined the "relevant labor market" as men and women in the 25-34 year old age group with one or more years of college, both of which factors lowered the median weights in the HES study. Pet.App.112a, 116a. By 1983 more than half of the female flight attendants at United were over the age of 35. ER 117. Since 1980, flight attendants have only been required to be high school graduates. ER 122.

[4] United terminated its weight requirements in August, 1994.

that United revise its weight program. Pet.App.125a-126a. Indeed, the decision says, " . . . United's exception policy was designed to make reasonable and fair accommodation to the unique problems of those particular employees." Pet.App.124a. When the settlement agreement was presented to the district court, counsel wrote, "Except as reflected in the revised weight program . . . the parties will proceed in accordance with the Court's Decision and Order dated October 30, 1979." ER 41.

B. The Present Action Was Filed In 1992

The present action was filed on February 7, 1992, in the United States District Court for the Northern District of California. It addresses only the new weight program implemented in 1980. ER 142:7.

Pursuant to a stipulation, the gender discrimination claims were certified as a Rule 23(b)(3) class action, alleging violations of 42 U.S.C. § 2000e (Title VII). The class was defined as " . . . all female flight attendants employed by United Airlines currently or in the future and all female flight attendants who were terminated, retired or resigned on or after January 5, 1989, as a result of their failure to comply with United's weight requirements." In addition, the parties stipulated to a class for age discrimination under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.*

Initially, on January 19, 1995, the district court for the Northern District of California denied United's "*res judicata* motion." Pet.App.57a. In August, 1995 the court granted United's motion for reconsideration on the

ground that litigation over gender discrimination in the weight requirements was barred by the final judgment in *ALPA*. Pet.App.58a.

In a February 26, 1997 Order, the district court dismissed the disparate impact age discrimination claim, relying on the Tenth Circuit's decision in *Ellis v. United Airlines*, 73 F.3d 999 (10th Cir. 1996). Pet.App.55a.

C. The Ninth Circuit's Decision

On June 21, 2000, a divided panel of the Ninth Circuit reversed the district court on these two issues and also held that Respondents are entitled to summary judgment on their class-wide and individual claims for disparate treatment gender discrimination. ER 19a.[5] United's

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[5] The Ninth Circuit concluded that this case is analytically indistinguishable from *UAW v. Johnson Controls*, 499 U.S. 187, 111 S.Ct. 1196, 113 L.Ed.2d 158 (1991) and *Healey v. Southwood Psychiatric Hosp.*, 78 F.3d 128 (3d Cir. 1996) and granted Plaintiffs' 1994 motion for summary judgment on the ground that United's mandatory weight maximums were facially discriminatory. Pet.App.15a. The court found that the "uncontroverted evidence" shows that United's weight maximums for women generally corresponded to the medium frame category of the Metropolitan Life Insurance Tables ("MetLife's Height and Weight Tables") for medium frame women while the weight maximums for men corresponded to Metlife's large frame category for men. Pet.App.15a. Petitioner does not dispute this finding, except to say that " . . . there were undoubtedly material issues of fact still in dispute." Pet.26 n.15. The fact that Petitioner cannot identify any material issues of fact still in dispute confirms the Ninth Circuit's finding that the evidence was "uncontroverted." Petitioner incorrectly identifies the 1953 MetLife tables as the source of the comparison. Pet.8.

petitions for rehearing and for rehearing en banc were denied on August 11, 2000.

The Ninth Circuit stated five reasons for its decision that claim preclusion does not bar the present action. The claims in the present action arose after the date of the *ALPA* judgment; the claims in the present action are based on a different weight policy from that challenged in *ALPA;* notice in *ALPA* was not sufficient under Rule 23 to preclude monetary claims in later suits; the post judgment settlement in *ALPA* was not incorporated into a judgment and was never subjected to the scrutiny of a "fairness hearing" and the class representatives in *ALPA* failed to adequately represent the interests of the Plaintiff class in this action. Pet.App.9a-13a.

The decision below also rejected any argument in favor of collateral estoppel/issue preclusion. As in this Petition, United offered nothing more than a footnote stating that issue preclusion was an alternative argument. Pet.App.13a Pet.13 n.7.[6]

The 1983 tables were used in the lawsuit. ER 198. Petitioner is also incorrect in its assertion that the district court in *ALPA* rejected those comparisons based on expert testimony. Pet.8, Pet.App.111a-117a.

[6] The district court based its decision entirely on *res judicata*/claim preclusion. "While intervening changes of fact or law could prevent application of collateral estoppel, they do not preclude *res judicata*." Pet.App.64a. Indeed, Petitioner did not argue issue preclusion/collateral estoppel in the district court and informed the court that it was using the term *res judicata* to mean claim preclusion rather than both claim and issue preclusion. ER 276-277, 278 n.10.

The Ninth Circuit also reversed the district court's Order dismissing Plaintiffs' disparate impact age discrimination claim, remanding to the lower court for further proceedings. Pet.App.19a.

REASONS WHY THE PETITION SHOULD BE DENIED

This Petition for Writ of Certiorari should be denied because, contrary to Petitioner's contention, this case does not present the Court with an opportunity to decide whether members of a "mandatory" Rule 23(b)(2) class are freed from the preclusive effect of a class judgment if they subsequently pursue an action for damages.

This case is not a "subsequent claim for monetary damages" arising from the same cause of action addressed in *ALPA*. On that ground alone this case presents a completely different set of issues from those in *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117 (1994) (certiorari dismissed as improvidently granted); *Adams v. Robertson*, 520 U.S. 83 (1997) (certiorari dismissed as improvidently granted) or *Ortiz v. Fibreboard Corp.*, 527 U.S.815 (1999) (decided on other grounds), the cases on which Petitioner relies.

In addition, this Petition should be denied because Petitioner's contention that the decision below makes a fundamental change in preclusion law by relying on "immaterial" changes mischaracterizes the Ninth Circuit's decision.

Petitioner is attempting to create an issue by confusing the doctrines of claim preclusion and issue preclusion. All of the cases it cites to establish a conflict with the Ninth Circuit's reasoning regarding claim preclusion actually address the doctrine of issue preclusion.

Finally, this Petition should be denied with respect to the disparate impact age discrimination issue. The weight program in this case increased a flight attendant's weight maximum by three pounds every ten years between the ages of 25 and 55. That made the weight program an employment policy by which United classified its employees on the basis of age. 29 U.S.C. § 623(a)(2), Pet.App.130a. Although the amount of the weight increase was facially neutral, Plaintiffs allege that it had a disparate impact on flight attendants over the age of 40.

None of the cases Petitioner cites for a conflict among the circuits addresses employment policies which classify employees on the basis of age. They all address disparate impact age discrimination arising from factors which are merely correlated with age.

Furthermore, the disparate impact age discrimination claim has been remanded to the district court for further proceedings. It is effectively a denial of United's motion for summary judgment, which is not a final order. Therefore the issue is not ripe for review by this Court.

I. THE NINTH CIRCUIT'S RULING ON THE PRECLUSIVE EFFECT OF THE *ALPA* JUDGMENT IS IN LINE WITH ESTABLISHED PRINCIPLES OF CLAIM PRECLUSION AND ISSUE PRECLUSION AND DOES NOT CREATE A CONFLICT AMONG THE CIRCUITS

The Ninth Circuit stated five reasons for holding that the present action is not subject to claim preclusion from the 1979 judgment in *ALPA*. They are all well-established principles of preclusion law which do not conflict with Supreme Court precedent or other courts of appeal.

A. Whether Or Not Rule 23(b)(2) Notice May Have A Preclusive Effect On Later Actions Certified Under Rule 23(b)(3) Must Be Considered On a Case By Case Basis To Determine Whether The Prior Action Ensured Protection Of Absent Class Members

In order to craft an argument which makes the Ninth Circuit's decision a portent of the evils of forum shopping and multiple lawsuits, Petitioner greatly exaggerates the effect of the court's conclusion that Rule 23(b)(2) notice in *ALPA* did not create a claim preclusion bar to the present action which is proceeding under Rule 23(b)(3), on a different cause of action, 15 years later.

As the decision below makes clear, this is a "notice" issue. Pet.App.166a-168a. As this Court has said on more than one occasion, whether notice in a prior action is sufficient to bar a subsequent action depends first on whether the prior proceeding " . . . was so devised and applied as to ensure that those present are of the same class as those absent." *Richards v. Jefferson County, Ala.*,

517 U.S. 793, 801, 116 S.Ct. 1761, 1767 (1996). *See also, Hansberry v. Lee*, 311 U.S. 32, 43-44 (1940) (concluding that the procedure and course of litigation did not ensure the full and fair consideration of the common issue).

In this case, the Ninth Circuit held that when the class representatives in *ALPA* agreed to dismiss their appeal they failed to adequately represent the class members who were not seeking reinstatement or back pay in 1979.[7]

Petitioner does not address this issue beyond stating in a footnote that United did not rely on any settlement for its preclusion arguments. Petitioner was at least aware of the issue because the district court relied on it. In its August, 1995, Order, the district court held that the settlement was " . . . an agreed upon disposition by the class." Pet.App.62a.

Dismissal of the appeal made the adverse ruling into a final judgment. Class members had no other options because they were in a Rule 23(b)(2) class action with no right to "opt out."

The fact that it was a post-judgment settlement exacerbated the conflict between the interests of the class

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[7] Plaintiffs in this case were unnamed, absent members of the class in *ALPA*. Pet.App.12a n.6. Class representatives in *ALPA* first appealed the adverse ruling then dismissed it as part of a post-judgment settlement which did not require approval from the court. Pet.App.9a. The Ninth Circuit held that when the class representatives in *ALPA* chose not to appeal, " . . . they abandoned any representation of the interests of those present and future class members in order to protect present class members seeking back pay and reinstatement." Pet.App.12a.

representatives and the remaining class members because it meant that there was no opportunity to object in a "fairness hearing." Pet.App.11a.

Without addressing the merits of Petitioner's concerns about the possibility of class members securing the benefits of class judgments without being bound by them, the fact remains that no such issues are presented by this action.

B. This Action Does Not Present A Claim For Monetary Damages Arising From The Cause Of Action Decided In *ALPA*, Therefore The Ninth Circuit's Conclusion That Rule 23(b)(2) Notice In *ALPA* Does Not Bar This Rule 23(b)(3) Action Does Not Raise The Same Due Process and Preclusion Questions That This Court Previously Granted But Never Resolved In *Ticor Title Insurance Co. v. Brown* or *Adams v. Robertson*.

This action was filed twelve years after the 1979 judgment in *ALPA* and addresses a new weight program implemented in 1980. The decision below says that this action does not address the same weight program so it does not address the same cause of action. Pet.App.10a.

In *Ticor Title Ins. Co.*, 511 U.S. 117 at 120-121, 114 S.Ct. at 1361, and in *Adams*, 520 U.S. 83 at 86, 117 S.Ct. at 1029, this Court certified questions regarding the due process right of class members to opt out of any class action which asserts monetary claims on their behalf. Those cases do not address a new lawsuit on a new cause of action.

That alone defeats Petitioner's argument that this case presents the Court with an opportunity to decide the question it was unable to decide in those cases. Pet.11.[8]

Petitioner argues that "the essential function of certifying a class action under *any* of the subsections of Rule 23, *including* Rule 23(b)(2), is to give the resulting judgment binding effect on all class members under normal principles of *res judicata*." That is exactly what the Ninth Circuit's decision does in this case. Under the normal principles of claim preclusion/*res judicata*, the Rule 23(b)(2) notice in *ALPA* was insufficient to create a bar to this Rule 23(b)(3) action.

C. Petitioner Attempts To Create An Issue By Confusing Claim Preclusion And Issue Preclusion

In a second argument, Petitioner attempts to create the illusion of a conflict with other Circuits and Supreme Court Precedent by confusing the doctrines of claim preclusion and issue preclusion. Petitioner calls it "the Ninth Circuit's new test. . . . " Pet.25.

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[8] Petitioner also cites *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999) which is similarly distinguished from this case and was decided on other grounds.

Notably, Petitioner is unable to cite a single case in which any federal court applied claim preclusion to an action arising after the entry of judgment in the preceding action or to a different nucleus of transactional facts. Pet.App.10a. *See Constantini v. Trans World Airlines*, 681 F.2d 1199, 1201-02 (9th Cir. 1982) (setting forth test for identity of claims).

Instead Petitioner resorts to citing case law interpreting issue preclusion in order to create a conflict with the Ninth Circuit's analysis of claim preclusion. *See, e.g., Montana v. United States*, 440 U.S. 147, 157-58, 62 (1979) (determining the appropriate application of collateral estoppel), *EEOC v. American Airlines*, 48 F.3d 164, 166 (1995) (applying collateral estoppel), *Coleman v. C.I.R.*, 16 F.3d 821 (7th Cir. 1994) (relying on the doctrine of collateral estoppel to preclude re-litigation of issues presented in prior litigation).

Petitioner's argument actually highlights the solidity of the Ninth Circuit's reasoning and the fact that there are no grounds for granting Petitioner's request for a Writ of Certiorari.

As it did in its briefs to the district court and the court of appeal, in its Petition to this Court United limits its discussion of issue preclusion/collateral estoppel, to a brief mention in a footnote. Pet.13 n.7, Pet.App.13a, ER 276-277, 278 n.10. The reason is obvious. Issue preclusion does not act as an automatic bar and in this case would require consideration of changes in fact and law in the twelve years between the 1979 *ALPA* judgment and the filing of the present action in 1992. As this Court said in

Montana, "It is, of course, true that changes in facts essential to a judgment will render collateral estoppel inapplicable in a subsequent action raising the same issues [citations omitted]. *Id.* at 159, 99 S.Ct. at 975.

Petitioner confines its argument to only one of the changes in facts essential to the *ALPA* judgment, calling the two pound increase in weight maximums "immaterial."[9] There were other changes in facts, however, which were indisputably "material" to the *ALPA* judgment.

In *ALPA* the district court relied on statistical comparisons to the "relevant labor market" within the "HES study" conducted in 1962. The court defined the "relevant labor market" as men and women in the 25-34 year old age group with one or more years of college. Both of those factors lowered the median weights in the HES study. Pet.App.112a, 116a.

Those statistics are no longer comparable, not only because they were thirty years old when this action was filed but also because by 1983 more than half of United's female flight attendants were over the age of 35. Furthermore, since 1980 United has only required that flight

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[9] Petitioner's characterization of this change as "immaterial" is insufficient to establish issue preclusion but it does support the Ninth Circuit's conclusion that the 1979-1980 settlement of the *ALPA* litigation, which consisted of the implementation of this new plan and dismissal of the appeals, "abandoned" the interests of class members who were not seeking reinstatement or back pay in 1979. The only benefit they received from the settlement was this change in weight maximums which Petitioner characterizes as "immaterial" and another increase of three pounds every ten years.

attendants be highschool graduates. ER 117, 122. Age and education made a significant difference in the median weights in the HES study and in the district court's decision in *ALPA*. Pet.App.112a, 116a.

D. Petitioner Confines Its Request To Preclusion Issues And Does Not Request A Writ of Certiorari To Review The Ninth Circuit's Decision That Plaintiffs Are Entitled To Summary Judgment On Their Disparate Treatment Claim

Petitioner does not request a Writ of Certiorari to review the Ninth Circuit's holding that the gender discrimination class is entitled to summary judgment on their disparate treatment claim.

In a footnote, Petitioner states that the Ninth Circuit erred in granting Respondents' motion for summary judgment because there were "undoubtedly" material issues of fact still in dispute. Pet.26 n.15. The fact that Petitioner is unable to identify any of those issues confirms the decision below.

II. THE NINTH CIRCUIT HAS REMANDED THE DISPARATE IMPACT AGE DISCRIMINATION CLAIM FOR FURTHER PROCEEDINGS MAKING REVIEW BY THIS COURT PREMATURE

A. United's Weight Program Was An Employment Policy Which Classified Employees By Age

In addition to certifying a class for gender discrimination the district court certified a class for age discrimination.

In 1997 the district court dismissed all of Respondents' age discrimination claims, including its claim of disparate impact age discrimination.

In the decision below the Ninth Circuit remanded the disparate impact claim for further proceedings.[10]

Petitioner requests a Writ of Certiorari on the ground that several other circuits are in conflict over whether disparate impact is cognizable under the ADEA. That argument must fail, however, because not one of the cases Petitioner cites addresses disparate impact age discrimination arising from an employment practice which classifies employees on the basis of age.[11] 29 U.S.C. § 623(a)(2).

United acknowledges that weight increases with age. Therefore, the weight program automatically increased a flight attendant's weight maximum by three pounds every ten years between the ages of 25 and 55. P/Supp ER 32:14-16. The increases constituted a facially neutral employment policy which classified employees on the basis of age and had a disparate impact on the protected class.[12]

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[10] The disparate impact age discrimination claim will have little if any effect on the class members because damages are limited to lost wages. The same damages are now recoverable by female flight attendants in the gender discrimination class.

[11] The weight program at issue in this case is not the same program the Tenth Circuit reviewed in *Ellis v. United Airlines*, 73 F.3d at 1006 (stating that weight requirements for new hires disregard age entirely, while the weight standards for employees make allowances for weight gain according to age).

[12] In the decision below, the Ninth Circuit affirmed the district court's dismissal of Plaintiffs' disparate treatment

B. The Disparate Impact Age Discrimination Issue Is Not Ripe For Review By This Court

The Ninth Circuit remanded the disparate impact age discrimination issue for further proceedings before the district court. Pet.App.19a.

In 1995 the district court denied Defendants' motion for summary judgment on Plaintiffs' disparate impact age discrimination claim, saying,

> But United could discriminate on the basis of age even while allowing for *some* weight increases for older employees, if the increases are insufficient to account for relevant differences between younger and older workers. . . . The age discrimination claim presents factual issues under both disparate treatment and disparate impact analyses. . . . Pet.App.65a-66a.

Until those issues of fact have been decided, there is no final order on Respondents' disparate impact age discrimination claim and it is not ripe for review by this Court. *See, e.g., Catlin v. U.S.*, 324 U.S. 229 (1945) (limiting appellate review to "final decisions" which end the

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claims on the ground that the weight policy discriminated on the basis of sex and weight, factors which are merely empirically correlated with age. Pet.App.19a.

The fact that Petitioner's intentional discrimination was motivated by factors merely correlated with age does not diminish Respondents' allegation that the weight program's allowances for age were facially neutral but had a disparate impact on flight attendants over the age of 40.

litigation on the merits and leave nothing for the court to do but execute the judgment.)

CONCLUSION

For the foregoing reasons, the petition for Writ of Certiorari should be denied.

Respectfully submitted,

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February 2, 2001.